2000

Utah v. Angela Rasmussen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
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Plaintiff and Appellee,	:	Case No. 20000773
	:	
vs.	:	Priority No. 2
	:	
ANGELA RASMUSSEN	:	**ORAL ARGUMENT REQUESTED**
	:	
Defendant and Appellant.	:	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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I. INTRODUCTION.

In its opening brief, the State promotes a form over substance and procedure over justice approach to this case. Rather than focus on the issue of whether Angela Rasmussen ("Appellant") should be punished because she stole a dress, the State seeks to punish her because of alleged mistakes made by both her trial and appellate counsel. Appellant admits that her trial counsel did indeed err in several, critical respects and that those errors prejudiced her greatly. Indeed, perhaps Appellant's *pro bono* appellate counsel with no criminal experience has erred as well. Appellant, however, should not be punished because of the alleged errors of her trial or appellate counsel.

The relevant inquiries in this case are and should be: (1) whether the prosecution admitted sufficient evidence to support a guilty verdict, (2) whether the trial court abused its discretion by excluding evidence relevant to explain Angela's actions in the Deseret Industries ("D.I.") parking lot, and (3) whether Angela's trial counsel was so inadequate and ineffective that Angela's constitutional right to counsel was violated.

The State seeks to side-step the relevant inquiries. First, in the face of sufficiently marshaled evidence, the State claims that this Court does not have enough evidence in front of it to deliberate and form an opinion. Therefore, the State asks the Court to disregard the insufficiency claim altogether. Second, the State asks the Court to disregard the exclusion of evidence claim by emphasizing trial counsel's ineffectiveness in failing to proffer the evidence. Finally, the State requests that the Court ignore the ineffective

assistance of counsel claim because of appellate counsel's alleged deficiencies in creating an adequate record for appeal.

As mentioned, the State's arguments promote form over substance and largely ignore the merits of this case. Appellant has adequately marshaled the evidence to allow the Court to make a ruling on the insufficiency claim. Also, failure to proffer the excluded evidence at trial simply emphasizes trial counsel's ineffectiveness. Finally, an ample record exists for the Court to consider and rule on the ineffective assistance of counsel claim. And even if the Court determines that the record is incomplete, the remedy is not to punish Angela but rather to remand the case for findings sufficient to complete the record.

II. BECAUSE APPELLANT HAS MARSHALED ALL THE EVIDENCE FAVORABLE TO THE JURY'S VERDICT THE COURT SHOULD CONSIDER THAT EVIDENCE AND HOLD THAT IT WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT IN THIS CASE.

Appellant agrees with this Court's statements that in order to challenge the sufficiency of the evidence on appeal, the appellant "must first marshal all the evidence supporting the jury's verdict and then demonstrate how this evidence, even viewed in the most favorable light, is insufficient to support the verdict." *State v. Strain*, 885 P.2d 810, 819 (Utah Ct. App. 1994). Appellant also agrees that "[f]ailure to marshal the evidence waives an appellant's right to have his claim of insufficiency considered on appeal." *State v. Gallegos*, 851 P.2d 1185, 1189 (Utah Ct. App. 1993). The Appellant disagrees with the State, however, in the proposition that the evidence has not been marshaled here.

Before addressing the list of evidence the State alleges that appellant failed to marshal, it is important to note that the evidence the Appellant did marshal on page 13 of her brief mirrors the evidence that the prosecution itself identified as supporting the verdict in its Objection to the Motion for Arrest of Judgment below. R: 113-114. It is absolutely disingenuous for the State to now aver that the Appellant must marshal more evidence than the prosecution itself identified.

This simply is not a case where the Appellant "made no attempt to marshal the evidence in support of the jury finding." *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 800 (Utah 1991). Nor is it a case where the Appellant "wholly fail[ed] to marshal the evidence supporting the jury's verdict." *State v. Pilling*, 875 P.2d 604, 608 (Utah Ct. App. 1994). Rather, Appellant has complied with this Court's mandate in *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311 (Utah Ct. App. 1991) that the challenger present "every scrap of *competent* evidence introduced at trial which *supports* the very findings the appellant resists." *Id.* at 1315 (emphasis added). While the State has provided a laundry list of evidence it claims was not properly marshaled, the listed evidence either was marshaled, is not competent, or is does not support the jury's finding of the key issue–whether a theft occurred.

A. Appellant Was Not Required to Marshal the Evidence Provided in the State's List Because the Evidence Was Either Marshaled, Incompetent or Did Not Support the Jury's Finding of "Theft."

Each item in the State's list will be dealt with in turn.

1) Familiarity with the bid section of the store and bidding procedure.

This piece of evidence is not supportive of the jury's verdict that Angela committed a theft. Ms. Rasmussen did admit that she was familiar with the bid area but the testimony of Lindsay Waldron, a witness for the State, indicates that Angela did not secretively remove the dress from the bid area but rather approached the sales counter with it and stood in line there. R. 130: 99. That one frequents and is familiar with a Deseret Industries hardly proves that one is guilty.

2) Defendant did not deny that she removed the wedding dress from the bid area.

This evidence does not support the jury's finding of a theft. For the same reasons mentioned above, appellant was not required to marshal this evidence. Moreover, counsel in fact told the Court that Appellant did not deny that she had the dress in her possession.

3) Defendant overheard Ms. Waldron express her surprise about defendant's inappropriate possession of the dress, she abandoned her place in line and her alleged inquiry about the bid status of the dress, and then walked toward the rear of the store.

Again, this evidence does not support the jury's finding of theft. Ms. Waldron testified that Angela did not take "evasive action" upon leaving the line. R. 130: 99. Also, no evidence was produced that Angela heard Ms. Waldron. Indeed, the fact that Angela was standing in the cashier's line at all lends support to a "not guilty" verdict because it supports an inference that Angela did not intend to take the dress. Why would someone seeking to steal an item stand in the cashier's line with the item in plain view?

4) Ms. Waldron observed defendant, dress always in hand, browse the clothes racks while periodically looking up at Ms. Waldron and her husband.

This evidence also does not support the jury's verdict. Ms. Waldron testified that she observed Angela browse the racks for only "three minutes" before losing eye contact with her and at that time she did not see her again before leaving the dressing room. R. 130: 100.

5) In the company of a cashier, Ms. Waldron found defendant exiting one of the dressing rooms, located by the stores' exit with an extremely full duffel bag in her hand.

Appellant marshaled this evidence. On page 13 of Appellant's brief, it states: "Defendant was seen leaving the dressing room with a duffle bag that appeared to be bulging."

6) Prior to defendant's exit from the dressing rooms, Ms. Waldron had not seen anything other than the wedding dress in defendant's possession.

This does not support the jury's verdict. As mentioned, Ms. Waldron testified that she lost eye contact with the appellant and did not see her again before leaving the dressing room. The fact that Ms. Waldron did not see Angela carrying anything but the wedding dress for three minutes after Angela left the cashier's line does not support a guilty verdict. Moreover, this testimony contradicts her testimony at a preliminary hearing and thus calls her credibility into question. R. 129:16

7) an immediate search of all he [sic] dressing rooms by three employees failed to uncover the wedding dress.

This evidence was not marshaled because it was not competent. Contrary to the State's assertion, this evidence was based on hearsay and laying a foundation does not remedy a hearsay statement. Even if the Court were to find this evidence competent, it does not support the jury's verdict because no testimony was offered that proved Angela entered the dressing room with the dress. Rather, the only testimony was that Angela left the dressing room with a "bulging" duffle bag, which was marshaled.

8) both Mr. Wilcox and Ms. Waldron saw defendant walk out of the D.I. carrying a bulging, small green duffle bag, about a foot-and-half long.

This evidence was marshaled on page 13 of Appellant's brief ("Defendant was seen leaving the dressing room with a duffle bag that appeared to be bulging"). Regarding this evidence, it is important to note that the prosecution's own witnesses have changed their testimony throughout the course of this case. For example, Mr. Wilcox told police officers at the scene that the duffle bag was blue. *See* Exhibit 4 of Addendum to Appelant's Opening Brief, Police Report, page 2. Then at the preliminary hearing Mr. Wilcox testified that the duffle bag was brown. R. 129:24. Finally at the trial, he stated that it was green. R. 130:45. Ms. Waldron testified at trial that the duffle bag was blue, not brown. R. 130:90. This may not seem like a relevant fact but it strongly supports the inference that the witnesses could not remember the characteristics of the bag, let alone whether it appeared to be "bulging." These contradictions weaken, not strengthen, the prosecution's case. Nevertheless, this evidence was marshaled.

> ***9) Mr. Wilcox approached defendant in a calm and friendly manner, asking to speak with her.***

This evidence was also marshaled. On page 13 of Appellant's brief, Appellant marshals the evidence that defendant fled the scene despite repeated requests to stop. Mr. Wilcox's approach was a request to stop. Furthermore this marshaled evidence encompasses other evidence that the State alleges Appellant failed to marshal– to wit, number 13 (that defendant turned and fled to her car) and number 14 (Mr. Wilcox again attempted to address defendant).

> ***10) in accordance with his usual practice, Mr. Wilcox was wearing a red employee vest along with a large identifying name tag.***

This evidence does not support the jury's verdict. No evidence was introduced that Ms. Rasmussen noticed Wilcox's clothing. Furthermore, on cross-examination, Mr. Wilcox admitted that defense counsel had seen him previously without the vest, despite his testimony that he "absolutely" wears the vest at all times. R. 130: 55-56. Thus, this evidence calls Mr. Wilcox's credibility into question. Moreover, how what Mr. Wilcox was wearing evidences guilt is beyond Appellant.

> ***11) Mr. Wilcox is disabled, to wit: he has a prosthetic knee, which prevents him from running and he has one lung, which necessitates his wearing a plainly visible oxygen tank.***

It is hard to understand how this supports a guilty verdict for theft. Mr. Wilcox's infirmities are irrelevant as to whether Ms. Rasmussen actually took the wedding dress from the store. Also, it is important to note that Mr. Wilcox testified that Angela was 10-15 feet from the store when she turned and ran to her car. His infirmities make his

testimony unbelievable.[1] Yet, in spite of his ailments, Mr. Wilcox was able to reach Angela's car before she attempted to leave the parking lot and the prosecutor elicited no testimony that Angela waited for Mr. Wilcox to make his way to her car. R. 130: 45-46. Thus, the testimony of his ailments and his inability to walk calls into question the sequence of events and his ability to do what he said. This evidence does not tip the scales in favor of guilt but innocence, and trial counsel should have argued as much to the jury. This in not evidence that tends to establish guilt and need not have been marshaled.

12) both Mr. Wilcox and Ms. Waldron testified that defendant, from her reactions, was aware that Mr. Wilcox had tried to accost her.

Rather than support the jury's verdict, this evidence supports the evidence given by Ms. Rasmussen that she was intimidated by Mr. Wilcox and that she went to her car and locked the doors to be safe from the threat. R. 130: 146-47.

13) in response to Mr. Wilcox's attempts to accost her, defendant turned and fled to her car.

Appellant marshaled this evidence. *See* number 9 above.

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[1]Mrs. Waldron approached Mr. Wilcox to tell him about the wedding dress, at first he could not make out what she was saying. Once he knew what she was implying, he faced the bid area and observed that the dress was gone, he asked Mrs. Waldron if she was sure. He then observed Angela leaving the dressing room with a bag. Mr. Wilcox then alerted three employees to search all four dressing rooms for the dress, he indicates that he waited for this search to be completed before he pursued Angela. He asked Mrs. Waldron to accompany him and together they left the store. When they exited, Angela was approximately 10-15 feet ahead of them, he asked her to stop, she then ran to her car. Wilcox walked down to the end of the lot to where Angela's car was parked, he approached her car and Angela jumped in. He knocked on her window, Angela backed her car out and Wilcox jumped or fell against the next car.

14) Mr. [sic] Waldron confirmed that when Mr. Wilcox reached defendant's car, he again attempted to address defendant in a friendly manner by tapping on the car window.

Appellant marshaled this evidence. *See* number 9 above.

15) in response, defendant started her car and put it in reverse, causing it to go "screaming backwards," knocking Mr. Wilcox toward another car; then, with her car pointing directly at Mr. Wilcox, defendant revved her engine and drove right at him.

Along with the next two items of evidence, Appellant marshaled this evidence in the statement that "Defendant hit an individual with her car." The "screaming backwards" was a point on which there was considerable disagreement amongst prosecution witnesses, R. 130: 93, all of which calls the varied accounts into question and weakens not strengthens the prosecution case.

16) defendant hit Mr. Wilcox with her car once and then a second time, throwing him onto the hood and then to the pavement car [sic], causing him serious bodily [injury] [sic].

Appellant marshaled this evidence. *See* number 15 above. Moreover, this is a point of significant contradiction among the prosecution's witnesses, R. 130:49, 74, 77-78, 94, 97, which again weakens not strengthens the prosecution's case. Appellant did not "marshall" or point out these weakening inconsistencies.

17) Ms. Waldron testified that the defendant had room to avoid hitting Mr. Wilcox and considered the incident intentional and not accidental.

Appellant marshaled this evidence. *See* number 15 above. Also, with respect to whether Ms. Waldron considered the incident intentional and not accidental, this evidence

is incompetent in that it is based on speculation. Moreover it contradicts Mr. Wilcox's own testimony. R. 130: 74.

> ***18) five employees, including Mr. Wilcox, again searched the D.I. store for the wedding dress on January 15, immediately after the incident and repeatedly in days afterward, but failed to find it.***

This evidence does not support the jury's findings. Whether the dress could be found is irrelevant because nobody ever saw Angela leave with the dress. In fact this evidence supports Appellant's testimony that she set the dress down while browsing the store.

> ***19) the missing dress reappeared in the bid area five days after the robbery in a place in which it would have been difficult to see.***

Both the fact that the dress reappeared and in a hard to see place, supports the inference that the dress never left the store and thus, that no theft occurred, and not an inference of guilt.

> ***20) defendant seriously undermined her own credibility by giving testimony which in light of the testimony of other witnesses and circumstances, was highly implausible and, by inference, incriminating.***

Not one case explaining marshaling of the evidence mandates that appellate counsel intimate that the defendant lied on the witness stand.[2] This is what the State expects appellate counsel to do however. Furthermore, whether other witnesses

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[2]In fact, for appellate counsel to suggest his client lied would likely violate Rule 1.3 of the Utah Rules of Professional Conduct. Lawyers must litigate their client's case with diligence and zeal. To suggest that a client is lying violates that mandate.

contradicted appellant's trial testimony is not a piece of "evidence" that must be marshaled.

One of the principle reasons litigants are required to marshal the evidence in challenging a jury verdict is to aid "the appellate courts in deliberations and in the opinion-writing process." *State v. Moore*, 802 P.2d 732, 738 (Utah Ct. App. 1990). In this case, Appellant has marshaled sufficient evidence to allow this Court to deliberate and write its opinion. To suggest that one must repeatedly marshal the same evidence or that one must marshal incompetent or unsupportive evidence implies that the Court is incapable of writing an intelligent opinion with only the *essential* evidence in front of it. Since that is not the case, this Court should rule that the appellant has sufficiently marshaled the evidence in order to challenge the jury's verdict.

B. The Marshaled Evidence is Insufficient to Support the Jury's Guilty Verdict.

As discussed fully in the Appellant's opening brief, the marshaled evidence is insufficient to support the jury's verdict. It is true that to succeed in challenging the jury's verdict the evidence and inferences based on that evidence must be "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was committed." *State v. Petree*, 659 P.2d 443, 444 (Utah 1983). The *Petree* court went on to explain however that the reviewing court must analyze the evidence closely to assure that it rebutts the presumption of innocence. The court stated:

> [T]his court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. *But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt.*

Id. at 444-45 (emphasis added). The case at hand is precisely the type of case the *Petree* court warned of; one where the Court would be required – even after stretching the fabric of the State's evidence to its limits – to make the speculative leap described to affirm the jury's verdict.

The State's evidence of theft in this case was entirely circumstantial. Although it is true that a conviction can be based on circumstantial evidence, "'[a] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.'" *State v. Lyman*, 966 P.2d 278, 281 (Utah Ct. App. 1998). In this case the inferences drawn from the circumstantial evidence surrounding theft are so remote and speculative that the jury's verdict cannot stand.

The State makes much of the fact that the defendant was the last person seen with the wedding dress before it allegedly disappeared and that she left the store immediately after the disappearance. In this regard, this case is similar to *Petree.* In that case, Petree was convicted of murder because he was the last person seen with the victim before she disappeared, and he left town shortly after the disappearance. *See Petree*, 659 P.2d at 445. The court however reversed the jury's verdict and discharged Petree from custody.

See id. at 447. This case is similar because the only evidence that the wedding dress was stolen was that Angela was the last person seen with it and she left with the duffle bag shortly after the dress' "disappearance." Particularly damning to the State's case is the fact that the dress was found in the D.I. store less than five days later, with no explanation as to how it "reappeared."[3] Indeed, the admitted lack of evidence as to how it reappears compels a jury to speculate as to how it got back. With the dress back in the store and no direct evidence that it ever left– the jury's conclusion is clearly based on a remote and speculative possibility of guilt.

Because of this snag, the State in its appellate brief tries to employ the same tactic that the prosecution at trial used–it draws attention away from the problems of proof on the theft portion and focuses on the actions that occurred in the D.I. parking lot. At trial, the tactic succeeded in confusing and thus persuading the jury. As evidenced by the jury's question seeking to separate the actions that occurred inside the D.I. from the actions that occurred outside, it is clear that the jury convicted Angela based on the parking lot events. But "a defendant's flight from a crime scene, standing alone, 'does not support an inference of intentional conduct.'" *State v. Holgate*, 2000 UT 74, ¶ 23, 10 P.3d 346 (Utah 2000) (citations omitted) (stating also that "[f]light by itself is not

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[3]Despite the State's assertion that the inference is that the dress was "secreted back into the D.I.," *see* State's brief at 19, the prosecutor at trial specifically stated: "We haven't said she brought it back. I don't know if she brought it back. Nobody testified to that. We don't know how it got back, but its back in the store." R. 131:206, (emphasis added). Thus the prosecutor invites the jury to speculate, at a minimum as to how it got back in the store.

sufficient to establish guilt of the defendant"). Thus, the jury mistakenly convicted Angela of this crime. This Court now has the opportunity to remedy the jury's mistake by reversing the verdict.

It is clear that in convicting Angela the jury made several "speculative leaps." Reasonable minds surely entertained a reasonable doubt as to Angela's guilt in this case. To affirm the jury's verdict would require the Court to make similar "speculative leaps." *Petree* warned against such action and therefore the Court should reverse the jury verdict, holding that the State's evidence–stretched to its limits–was insufficient in proving Appellant guilty beyond a reasonable doubt.

III. THE STATE'S ASSERTION THAT THE COURT SHOULD NOT CONSIDER THE EXCLUSION OF EVIDENCE ISSUE EMPHASIZES TRIAL COUNSEL'S INEFFECTIVENESS IN FAILING TO PROFFER THE EXCLUDED EVIDENCE.

It is true that trial counsel failed to proffer the testimony that was excluded at trial. This simply adds to the laundry list of examples of trial counsel's ineffectiveness. Appellant agrees that trial counsel erred in failing to proffer the evidence. Appellant asserts however that this evidence was indeed important and would have affected the outcome of the case.

First it is important to note that appellate counsel, and Appellant herself for the most part had no control over trial counsel. Trial counsel wholly failed to proffer the evidence that the trial court excluded, evidence that would have explained Angela's actions in the parking lot. Consequently the presentence report–which gives details of a

previous assault that caused Angela to be apprehensive when approached by a strange man–contains the only proof of what the testimony would have been. (Presentence Report, R. 128 at p. 3). This evidence was extremely important to negate the intent element of the robbery crime and failing to proffer it after exclusion–along with the various other deficiencies described in Appellant's opening brief–emphasizes trial counsel's ineffectiveness.

The evidence, if accepted, would have changed the outcome of the case. As mentioned, the jury mistakenly convicted Appellant based on the events that occurred in the D.I. parking lot. If trial counsel would have introduced evidence explaining her actions, the jury would likely have reached a different result. Furthermore, as explained in Appellant's opening brief, the evidence was directly relevant to disprove criminal intent. *See* Appellant's Opening Brief at 17 (citing *State v. Harrison*, 805 P.2d 769 (Utah Ct. App. 1991)).

Tellingly, the State fails even to address the contention that the exclusion of the evidence was harmless. While the State's failure was perhaps an oversight, it also lends credence to Appellant's contention that the evidence was anything but harmless. The judge abused his discretion, and the court should reverse the verdict.

IV. AN ADEQUATE RECORD OF TRIAL COUNSEL'S DEFICIENCIES EXISTS TO SUPPORT A DETERMINATION THAT TRIAL COUNSEL WAS INEFFECTIVE AND IF THE COURT DETERMINES THAT AN ADEQUATE RECORD IS LACKING, IT SHOULD REMAND THE CASE FOR THE ENTRY OF FINDINGS SUFFICIENT TO COMPLETE THE RECORD.

With regard to the adequacy of the record demonstrating trial counsel's ineffectiveness, the State returns to the worn refrain that counsel's (this time appellate) sins should be visited on Appellant's head. Seemingly, the State seeks to avoid at all costs dealing with the merits of the ineffectiveness claim. It is not demanding, however, to examine the record and find numerous examples of ineffectiveness. But, if the Court finds that the record does not support the ineffectiveness claim, it should remand the case for a Rule 23B hearing in order to complete the record and do justice to the appellant. The court clearly has the power. Rule 23B(c) Utah R. App. P.

The State again lists several items that it alleges are unsupported by the record. However, the absence of some of these items constitutes record support of ineffectiveness. For example, the record does not indicate that counsel introduced the duffle bag into evidence. However, failure to introduce the duffle bag is precisely one of the many reasons why counsel was ineffective. Absence in the record of actions that counsel should have taken supports ineffectiveness. This same analysis can be done with failure to call the psychiatrist, failure to put on evidence that items in the D.I. are frequently misplaced, and failure to point out discrepancies in witness testimony.

If the Court finds that the ineffectiveness claim is not properly supported in the record, the proper action is not to punish the Appellant for it, but rather to remand the case for findings necessary to support the claim pursuant to Rule 23B Utah R. App. P. Rule 23B allows a motion for remand for "entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." The rule makes clear that the court retains the power to remand on its own motion: "Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion *at any time* if the claim has been raised and the motion would have been available to a party." In *State v. Litherland*, 2000 UT 76, ¶17 n. 7, 12 P.3d 92 (Utah 2000), the Utah Supreme Court affirmed this portion of the rule. After explaining that an inadequate record will result in construction of deficiencies in favor of a finding that counsel performed effectively, the court stated: "This standard does not preclude an appellate court from remanding on its own motion. The rule expressly provides that the appellate court may remand according to its discretion."

The fact that a portion of the ineffectiveness evidence is arguably not contained in the record does not lead to the conclusion that the evidence does not exist. Much of the evidence is contained in the report generated by the police officers who investigated the scene and other documents. To avoid the form over substance approach the State

advocates, the Court should remand this case for the necessary findings in the event that it determines the ineffective assistance claim is not properly supported by the record.[4]

CONCLUSION

For the foregoing reasons, the Court should hold that the Appellant sufficiently marshaled the evidence and that the marshaled evidence is insufficient to support the jury's finding. In that event, the Court should reverse the jury's verdict and discharge the appellant. Alternatively, the Court should rule that trial counsel for the appellant was ineffective and that the ineffectiveness is supported by the record. If the Court determines that the ineffectiveness is not supported by the record, it should remand the case to the trial court for a Rule 23B hearing. If the Court rules that counsel was ineffective or that the trial court abused its discretion in excluding evidence, the case should be remanded for a new trial consistent with the Court's decision.

ORAL ARGUMENT REQUESTED

Appellant has filed a Motion for Expedited Decision Without Written Opinion contemporaneously with the Response Brief. Appellant respectfully requests oral argument however on this appeal.

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[4]Such a hearing seems wholly unnecessary inasmuch as the thrust of the Appellant's position is that there is insufficient evidence to sustain the conviction. If the Court accepts this argument, no 23B hearing would be warranted and in fact would waste judicial resources. If the Court rules that the evidence is sufficient however, it should remand the case for a Rule 23B hearing, particularly where as here the evidence clearly exists it simply has not been made a part of the official record on appeal.

Dated this 18th day of April, 2001.

Randy T. Austin

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2001, a true and correct copy of the foregoing document was served by United States first-class mail, postage thereon fully prepaid on the following:

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